No. 18831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

ALEXANDER T. CHOHON,

Bankrupt.

OPENING BRIEF OF APPELLANTS.

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Introductory Statement.

This appeal is prosecuted by C. Douglas Wikle, Trustee in Bankruptcy of the above entitled estate, and involves the validity of a joint declaration of homestead of the bankrupt and his wife upon the joint tenancy interest of the bankrupt in the home of himself and wife, Agnes D. Chohon, held in joint tenancy, and which declaration of homestead was not recorded until one year, seven months and eighteen days after the filing of the bankruptcy herein.

Jurisdictional Statement.

The Court has jurisdiction of this appeal pursuant to the provisions of Section 24a of the Bankruptcy Act.

Statement of the Case.

There was an involuntary petition in bankruptcy filed herein on February 18, 1959, and the adjudication was entered therein on the 15 day of March, 1960.

C. Douglas Wikle was appointed trustee of the estate on the 13 day of December, 1960, and duly qualified by the filing of his bond in the sum of $10,000.00 on December 15, 1960.

The trustee filed his report of exempt property on August 1, 1961 refusing to set the homestead aside as exempt; that objections by the bankrupt to the trustee's determination of exempt property was filed herein on August 9, 1961.

The joint declaration of homestead of the bankrupt, Alexander D. Chohon was recorded on October 6, 1960. No declaration of homestead had theretofore been recorded.

On November 29 and 30, 1956, for a valuable consideration consisting of a loan in the sum of Forty Five Thousand and no/100 ($45,000.00) Dollars from Title Insurance and Trust Company, Alexander T. Chohon and his wife Agnes D. Chohon signed and delivered a grant deed to Title Insurance and Trust Company to that certain real property described as Lots 179, 180, 181, 182 and 183 of Tract No. 7101, County of Los Angeles, State of California as per map recorded in Book 77, Pages 32 and 33 of Maps in the office of the County Recorder of said county, and hereinafter described as the home property, to Title Insurance and Trust Company. Although in the form of grant deeds absolute on their face, the said conveyance was in fact a security transaction, reserving to Bankrupt and his wife equitable title to said real property pursuant to a Declaration of Trust executed on November 29, 1956, and recorded on August 8, 1960, by Title Insurance and Trust Company.

Question Presented.

The main question presented by this appeal involves the validity of a declaration of homestead of the Bankrupt under the laws of the State of California and the Bankruptcy Act, where the declaration of homestead was not recorded until more than one and one half years subsequent to the filing of the involuntary petition in bankruptcy against the Bankrupt.

The Laws of the State of California Govern in the Determination of the Validity of the Homestead.

The provisions of the Civil Code beginning with Section 1237 to Section 1304 inclusive, prescribes the procedure and manner of selecting a homestead and of abandoning same, and the law generally in relation to homesteads.

Sections 1262, 1263 and 1264 Civil Code, provide the necessary steps to be taken in order to perfect a valid homestead, one of which is the necessity for the recordation of same in the county in which the land is situated. See Section 1264, Civil Code.

Section 1241 Subdivision 1 provides:

> "The homestead is subject to execution *or* forced sale in satisfaction of judgments obtained;
>
> 1. Before the declaration of homestead is recorded, and which, at the time of such recordation, constitute liens upon the premises. . . ." (Emphasis ours.)

This clearly shows that under the laws of California a homestead is subject to either the levy of an execution or to a forced sale in satisfaction of judgments obtained, if either preceded the recording of the declaration of homestead.

Section 542 C. C. P. provides for the manner in which property may be attached, and Section 688, C. C. P., in defining what property is liable to execution, says:

> "All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, except one-half of the earnings of the defendant or judgment debtor received for his personal services rendered at any time within 30 days next preceding the levy of attachment or execution, and all property and rights of property seized and held under attachment in the action, are liable to execution."

Bankruptcy Act Provisions.

Section 6 of the Bankruptcy Act provides for the allowance of exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein the bankrupt has his domicile for six months preceding the filing of the petition.

Sections 70a and 70e of the Bankruptcy Act are pertinent to the issues here involved.

Section 70a of the Bankruptcy Act provides in part:

> "The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located. . . ."

and among the property described under sub-paragraph (5) of Section 70a of the Bankruptcy Act is:

> ". . . property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: Provided . . ."

Nature of Bankrupt's Interest in Property Attempted to Be Homesteaded.

Without question the interest of the Bankrupt in the home property on February 18, 1959, was such an interest which could have been transferred by the bankrupt within the meaning of Subdivision (5) of Section 70a of the Bankrupt Act or which could have been levied upon under Section 688 of C. C. P.

The Bankrupt's Interest in the Home Property Passed to the Trustee of the Bankrupt's Estate on February 18, 1959 at the Moment the Involuntary Petition in Bankruptcy Was Filed.

The filing of the petition in bankruptcy was February 18, 1959. On that date, and at the moment the bankruptcy petition was filed, the trustee herein, upon his appointment and qualification, was vested under Section 70a of the Bankruptcy Act, by operation of law, with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act.

If the bankrupt's interest in this home was property described in Section 70a of the Bankruptcy Act, then it became vested in C. Douglas Wikle when he became the qualified Trustee herein, not on the day that he qualified, but as of February 18, 1959.

Certainly an equitable interest in a home is an interest in land which the bankrupt could have, prior to February 18, 1959, transferred within the meaning of Section 70a(5). Therefore, it was property which reverted to C. Douglas Wikle, the Trustee, as of February 18, 1959, although his appointment as Trustee came much later.

It is wholly unnecessary for the Trustee to resort to Section 70c to defend his position here, and the fact that the provisions of Section 70a were not discussed by the Court in *Sampsell v. Straub,* 194 F. 2d 228, is no indication that it is inapplicable to the facts herein. Indeed, we submit it is controlling. The courts have held time and again that the line of demarcation in bankruptcy is the time of the filing of the petition.

How could the bankrupt possibly acquire a homestead upon an interest in property which had months before passed to his trustee in bankruptcy?

While Section 70a excepts property "which is held to be exempt" from passing to the trustee, a homestead exemption under the California law is not exempt and cannot be held to be exempt unless and until the person claiming the homestead prepares, executes and records the declaration of homestead in the manner provided by California law.

A home in California may be the proper subject for a homestead, but if the owner thereof fails to perfect the declaration of homestead and record the same as provided by California law prior to bankruptcy, then a late recordation will avail him nothing.

In *White v. Stump,* 266 U. S. 301, 45 S. Ct. 103, the Supreme Court was passing upon the validity of

a homestead exemption which arose under the laws of the state of Idaho, whose homestead laws appear to be very similar to California. In other words the laws of the State of Idaho require that in order to acquire a valid homestead exemption there must be a declaration made that the land is both occupied and claimed as a homestead and must be recorded: It must be executed and acknowledged like a conveyance of real property and must be filed for record in the office of the County Recorder.

The Court says:

> "The exemption arises when the declaration is filed, and not before. Up to that time, the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition the subsequent making and filing of a declaration neither avoids the levy nor prevents a sale under it."

The Supreme Court, after commenting upon a decision arising in this Court (*Brandt v. Mayhew,* 218 Fed. 422) with which it apparently did not agree, and after citing cases which held to the view that under the Bankruptcy Act the right to such an exemption must be tested by the situation existing when the petition in bankruptcy is filed, and held that where the land is not then exempt under the State law it passes to the Trustee for the benefit of the creditors, it goes on to say:

> "These and other provisions of the Bankruptcy Law show that the point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is

filed. This has been recognized in our decisions. Thus we have said that the law discloses a purpose 'to fix the line of cleavage' with special regard to the conditions existing when the petition is filed (*Everett v. Judson,* 228 U. S. 474, 479, 32 S.Ct. 568, 57 L. Ed. 927, 46 L.R.A. (N.S.) 154), and that 'it is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed and that his estate passes actually or potentially into the control of the bankruptcy court' (*Bailey v. Baker Ice Machine Co.,* 239 U. S. 268, 275, 36 S. Ct. 50, 54, 60 L.Ed. 275; *Acme Harvester Co. v. Beekman Lumber Co.,* 222 U. S. 300, 307, 32 S. Ct. 96, 56 L.Ed. 208). When the law speaks of property which is exempt and of rights to exemptions, it of course refers to some point of time. In our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors and the trustee in other particulars are fixed. The provisions before cited show—some expressly and other impliedly—that one common point of time is intended and that it is the date of the filing of the petition. The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt.' Section 70a. The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption—one which with-

draws the property from levy and sale under judicial process.

"The land in question here was not in that situation when the petition was filed. It was not then exempt under the state law, but was subject to levy and sale. One of the conditions on which it might have been rendered exempt had not been performed. Under the state law the fact that the other conditions were present did not suffice. The concurring presence of all was necessary to create a homestead exemption."

It will be noticed that the facts in the *White v. Stump* case are very similar to the facts here, and that the case was decided under the Idaho law which, in effect, is the same as the law of California under which this case must be decided.

It will also be noticed that the Supreme Court decided the *White* case upon the strength of the provisions of Section 70a of the Bankruptcy Act without mention of the provisions of Section 70c of the Act. For the same reasons as prevailed in the *White v. Stump* case, the decision in this case can be determined without the aid of Section 70c of the Bankruptcy Act.

The case of *Myers v. Matley,* 318 U. S. 622, 63 S. Ct. 780 is not in point here for the reason that it is based upon the law of the State of Nevada which permits the filing of a homestead even after a levy of execution and before sale. The Supreme Court in *Myers v. Matley,* 318 U. S. 622, 63 S. Ct. 780, distinguishes between the law of Nevada and Idaho, and says:

"If the law of Nevada respecting homestead exemptions were like that of Idaho, *or operated in*

the same way, White v. Stump would be in point." (Emphasis ours.)

See 145 A. L. R. 503 where the cases of *White v. Stump* and *Myers v. Matley* are distinguished.

Exemptions are ordinarily determined as of the date of filing bankruptcy.

9 Am. Jur. 2d, pp. 493-494, Paras. 652-653.

Sec. 6, Bankruptcy Act, and

Sec. 70a, Bankruptcy Act, which vests the trustee in bankruptcy with the title of the bank as of that date.

See also 25 Cal. Jur. 2d, page 433, paragraph 116, which is to the same effect.

See also 9 Am. Jur. 2d, 494, Par. 653 upon the necessity for perfecting homestead prior to bankruptcy.

The Provisions of Section 70c of the Bankruptcy Act Are Not in Conflict With the Above Cited Law, nor Do the Provisions Thereof Support the Contention of the Bankrupt Which Were Presented to the District Court Upon Review.

Section 70c of the Bankruptcy Act provides in part as follows:

> ". . . The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Under this section the trustee is vested as of the date of bankruptcy "with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such creditor actually exists." And this refers to a lien which could have been obtained by legal or equitable proceedings at the date of bankruptcy.

One of such liens would be a lien by virtue of a writ of execution served by the Sheriff upon a piece of real property. Under Section 688 C. C. P., such a lien would be valid against the bankrupt's interest regardless of whether his interest therein was an equitable interest or otherwise.

The case of *Belieu v. Power,* 54 Cal. App. 244, cited by the District Judge in his opinion, at pages 246, 247, distinguishes between a judgment lien and an execution lien and says at page 246:

> "The judgment was docketed before, and the homestead declaration was filed after the date of the contract of purchase. It becomes necessary, therefore, to inquire whether the inchoate right acquired by the respondent under his contract of purchase constituted such ownership of real property as rendered it subject to the lien of the judgment. It is clear, and is perhaps conceded, that property must be 'owned' by the judgment debtor before any lien can attach. It is not, by any means, every interest in property to which the lien of a judgment will attach, nor will it, in fact, attach to every species of property. The lien is not even a uniform consequence of the fact that a contract lien upon the property may be protected by the recording laws, as in the case of various classes of personal property; nor that the property

> may be taken under execution issued upon the judgment, as is seen in the case of personal property of every class. The whole matter is statutory. If it were purely a question of logic, it might be inquired why, if the lien of a chattel mortgage is, under certain conditions, protected by the recording laws, the lien of a judgment against the same classes of property should not, in like manner, be protected. Or, if certain inchoate interests in real property *may be seized on execution,* why they should not be subject to a judgment lien."

and then goes on to say:

> "Property interests of any and every kind, whether real or personal, and every interest therein are subject to seizure under attachment or levy on execution, unless exempt from execution. (Secs. 542 and 688, Code Civ. Proc.) While many classes of property may be taken on execution, only two classes are subject to the lien of a judgment—real property owned by the debtor at the time of docketing and real property that he may afterward acquire. While any interest in real property, legal or equitable, may be seized and sold under execution, only real property actually owned by the judgment debtor will support a judgment lien."

If a lien which a creditor could have obtained by legal or equitable proceedings at the date of bankruptcy is the test of the trustee power, "whether or not such creditor actually exists" then certainly he is in the position of an execution creditor who has levied upon an interest in real property and he is not confined to the position of a creditor holding a recorded abstract of judgment.

There are various kinds of liens in addition to a recorded abstract of judgment which are included in the definition of Section 70c of the Bankruptcy Act.

It will bear repeating that property held pursuant to an execution lien has priority over a subsequently recorded declaration of homestead. Section 688 C. C.

We respectfully submit that the judgment of the United States District Court herein should be reversed, and that the homestead of the bankrupt herein should be held to be invalid against the trustee's interest in the property in question.

Respectfully submitted,

UTLEY & HOUCK,
By ERNEST R. UTLEY,
Attorneys for Trustee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Ernest R. Utley